

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JABBAR COLLINS, : 11-CV-766 (FB)
Plaintiff, :
v. :
THE CITY OF NEW YORK, et al., : Brooklyn, New York
Defendants. : March 21, 2013

TRANSCRIPT OF CIVIL CAUSE FOR HEARING
BEFORE THE HONORABLE ROBERT M. LEVY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings began at 12:13 p.m.)

2 (Conference recorded via telephone - some inaudibility.)

3 THE COURT: Hello. Thank you for waiting. We're
4 here on Docket Number 11-CV-766, Collins v. City of New York,
5 et al.

6 Will counsel please state their appearances for the
7 record?

8 MR. RUDIN: Plaintiff Joel Rudin and Terri
9 Rosenblatt. Good afternoon, Your Honor.

10 THE COURT: Good afternoon.

11 MR. LARKIN: Your Honor, for the defendants Arthur
12 Larkin, L-A-R-K-I-N, for the City of New York. My co-counsel
13 Elizabeth Krasnow normally would be joining us but she's not
14 available. So it's just me.

15 THE COURT: Thank you. I just completed a hearing in
16 another case so I just want to make sure that the record is --
17 is everything picking up right now?

18 THE CLERK: Yes.

19 THE COURT: Great. Good. So let's just get an
20 agenda for this conference. The primary focus of this
21 conference from my perspective is on the privilege log and the
22 motion to compel documents that the defendants asserted
23 privilege for. So anything else that we need to deal with?

24

25 Yes, Your Honor. There are a number of issues that relate to

1 the document requests that the two sides have exchanged and
2 concerning some initial depositions that we'd like to take and
3 also the issue of -- there's a sealing issue that's arisen and
4 also the question about whether or not we could take a
5 deposition of Mr. Hines. So we just wanted to -- I just
6 wanted to bring to your attention these issues at some point
7 during this conference so that Your Honor could either decide
8 or give us some guidance on how you think they should be
9 handled.

10 THE COURT: Okay. Mr. Rudin?

11 MR. RUDIN: Should I begin?

12 MR. LARKIN: Yes, Your Honor, I'm sorry. I was
13 saying we've -- this is Arthur Larkin speaking. Mr. Rudin and
14 I have conferred and Ms. Krasnow and Mr. Rosenblatt as well.
15 All four of us have conferred at some length over the last
16 couple of days and I think we've isolated a few issues that
17 have come up and we've also -- I think we needed a schedule
18 to -- we the City -- I need to confer with the DA's office
19 about some of the document requests before I can take a firm
20 position on some of them and since I'm going to be out all
21 next week I was going to suggest getting back to Mr. Rudin at
22 some point the week of April 1st so that if there are open
23 issues we could have briefing prior to the April 17th
24 conference and we were discussing some dates, some interim
25 deadlines and I believe that plaintiff wanted a quicker

1 schedule than we were going to suggest. So maybe that would
2 one sort of one area to consult about with the court as well
3 today.

4 THE COURT: So, Mr. Larkin, sealing issues, Hines
5 deposition and scheduling?

6 MR. LARKIN: Yes, that's pretty much it. The
7 deposition I don't think we have a dispute. I think we --
8 plaintiffs have said he wanted to take four witnesses before
9 April 30th and subject to those witnesses schedules -- we need
10 to confer with those witnesses so subject to their schedules
11 we'd agree -- we'd certainly agree to do that, make every
12 effort to meet the -- to get them produced by that day. We
13 represent three of them. We don't represent one. So whatever
14 that witness' availability is it is but we'll make ourselves
15 available for an April 30th cutoff for those four deps.

16 THE COURT: Mr. Rudin, does that solve your problems
17 about your depositions?

18 MR. RUDIN: Yes, I could make a record of who they
19 are or if you don't think that's necessary then I can rely on
20 Mr. Larkin's position which he just stated.

21 THE COURT: You can tell me who they are if you have
22 it off the top of your head. If not I'm sure the two of you
23 will agree.

24 MR. RUDIN: Isua Franconia [Ph.], the trial original
25 prosecutors and Basunda [Ph.] who is ADA who was involved in

1 the earlier stages of the investigation, the prosecution,
2 Monique Ferrell [Ph.] who handled the 440 motion and the
3 habeas proceedings from 2006 until at some point in 2010.
4 Isen Newman who was a paralegal in the DA's Office during the
5 investigation and prosecution of the Collins case.

6 MR. LARKIN: And -- I'm sorry.

7 MR. RUDIN: I just add that Mr. Larkin will be
8 representing all but Isua Franconia who already has separate
9 counsel and we noticed her deposition previously and I'll be
10 in touch with her attorney just to work out dates that are
11 acceptable to everybody.

12 MR. LARKIN: And, Your Honor, forgive me for
13 interjecting one thing. I do know that Mr. Basunda and
14 Monique Ferrell still work at the DA's Office and we will
15 represent those witnesses at the deposition. I'm not sure
16 about Ms. Newman. I just don't know if she still works there.
17 If she does then it will be easy. We'll represent her and if
18 she doesn't we'll certainly make every effort to find her.

19 MR. RUDIN: I have some information of where she
20 resides. I think it's in New Jersey but I'll provide that to
21 Mr. Larkin. Mr. Larkin, can I assume that -- should I deal
22 with her through you?

23 MR. LARKIN: I'd appreciate that, yes.

24 MR. RUDIN: All right. But you'll make her available
25 on a date that works for everybody?

1 MR. LARKIN: I'll reach out to her and let her know
2 what the situation is and if she feels that she needs her own
3 lawyer then we'll have to deal with that but assuming that she
4 is willing to accept representation from us then that's fine
5 with me.

6 THE COURT: So does that take care of the deposition
7 issue? I assume that takes care of the deposition issue;
8 correct?

9 MR. LARKIN: I believe so.

10 MR. RUDIN: Your Honor, this is Joel Rudin. I agree
11 with that, yes.

12 THE COURT: Okay. Now the Hines deposition. He's a
13 pretty major player here. Mr. Larkin, what would be the
14 reason not to depose him?

15 MR. LARKIN: I think generally what the case law
16 says, Your Honor, is that in cases like this where a policy
17 maker's decisions are at issue the plaintiff has to depose
18 others in the office to get whatever information is needed
19 before you get to the question even whether to depose the
20 policy maker. If plaintiff were to depose one or more high
21 ranking witnesses in the office, maybe the chief assistant,
22 the first assistant -- it could be others. I'm not sure. And
23 if you exhaust those areas, those avenues rather and you still
24 have open questions that only the policy maker can answer then
25 you might have to produce the policy maker but I believe that

1 in cases like this commissioners, DA's and the heads of
2 agencies normally are not produced unless there's no other way
3 to get the information that's needed for the case.

4 THE COURT: Aren't there factual issues involving the
5 district attorney here in this case as to -- well, there were
6 some allegations made in Mr. Rudin's letter about specific
7 conduct by Mr. Hines with respect to investigations of some of
8 the conduct of his ADA's and his -- well, specifically how he
9 handled this case, that he was personally involved at least
10 after a certain point. Does that -- first of all, am I
11 correct in my recollection and secondly, if so, does that
12 affect your view of the case law?

13 MR. LARKIN: I don't specifically recall what is
14 alleged but assuming for the purposes of argument that that's
15 what the allegation is I would still say that testimony by
16 others could establish whether Mr. Hines was involved and what
17 he said and what he did and whether a deposition of him would
18 be necessary to shed further light on the issues in the case.
19 In cases like this when, for example -- I mean we've had cases
20 involving the DOC where the commissioner's deposition is
21 sought, we have cases where Commissioner Kelly's deposition is
22 sought, cases where DA Johnson, his deposition is sought and I
23 believe that Mr. Rudin actually in one case did take DA
24 Johnson's deposition if I'm not mistaken. But typically in
25 those cases we always leave that deposition until the very end

1 until all the others are done and even though -- even if the
2 policy maker may have had some involvement if others can shed
3 light on what was said and done and you don't need the -- you
4 may not need the policy maker himself to put aside duties and
5 come in and be deposed.

6 So ordinarily we revisit that issue toward the end
7 of discovery and I would just suggest that plaintiff ought to
8 exhaust whatever other witnesses there are and he can then
9 take another look at Hines' deposition if that's needed.

10 MR. RUDIN: Your Honor, may I be heard?

11 THE COURT: Of course

12 MR. RUDIN: This is an extraordinarily unusual case
13 where we already know that Mr. Hines was personally involved
14 in the Jabbar Collins case. When we filed our 440 motion in
15 2006 we moved to disqualify the entire District Attorney's
16 Office because Mr. Vecchione was the most powerful prosecutor
17 in the office and we allege that nobody could objectively
18 investigate him and also he was investigating the entire
19 Brooklyn judiciary on allegations of buying judgeships and
20 that the case should be moved out of Brooklyn.

21 So not only did the District Attorney's Office
22 oppose both of those applications successfully Mr. Hines never
23 signed Monique Ferrell who was the deputy of Mr. Vecchione.
24 She was counsel to the Rackets Bureau, counsel to Mr.
25 Vecchione, and had been involved in a number of high profile

1 cases [inaudible] co-counsel. That's who Mr. Hines assigned
2 to investigate our allegations and then when Judge Irizarry
3 told her that she had to get off the case because she was
4 going to have to testify about an alleged coverup of the
5 misconduct then Mr. Hines assigned Kevin Richardson who also
6 was a subordinate of Mr. Vecchione's in the Civil Rights
7 Bureau and she reported directly to Mr. Vecchione and had also
8 been co-counsel with Monique Ferrell and Vecchione in a number
9 of high profile cases.

10 Following the habeas proceedings Mr. Hines -- during
11 the habeas proceedings we know that Mr. Hines is personally
12 involved in determining what to do in the Jabbar Collins case.
13 He directed Mr. Richardson to relay [inaudible] statement on
14 the date that the case was dismissed defending Mr. Vecchione
15 and the office for doing nothing wrong and then Mr. Hines made
16 a number of public statements which Judge Block alluded to and
17 argued ratification of the misconduct and evidence that he had
18 an unlawful policy all along.

19 So there's personal involvement in the Collins
20 matter but in addition we've alleged in the complaint that we
21 intend to prove that he was personally involved in approving
22 or ratifying this conduct that occurred in a number of other
23 Brady violation cases, one of them the Leda case where he
24 wrote letters to various political figures who had asked him
25 about whether or not Leda had been wrongfully convicted and he

1 said that he personally went to the scene of the crime, he
2 personally reviewed the case and there were no Brady
3 violations and there was no other misconduct and he should
4 serve every day of his sentence and a number of years later
5 the Second Circuit granted a habeas based on the series of
6 Brady violations and called the argument by the District
7 Attorney ridiculous.

8 In addition to that, I deposed counsel to Mr. Hines,
9 Dino Amaroso, in another lawsuit, Zari v. City of New York. I
10 took the deposition in 2005 and I asked Mr. Amaroso and I
11 believe we provided copy of this to Mr. Larkin. I don't
12 know -- it was just yesterday so you may not have had a chance
13 to review it yet but I asked Mr. Amaroso what was the
14 procedure at the Brooklyn District Attorney's Office to
15 investigate prosecutors who had been -- who likely were
16 engaged in this conduct and to discipline them if ever, and
17 his testimony was that the procedure, there was nothing
18 written, there was nothing formal, there was no manual. The
19 informal procedure was that where there was a possible
20 inference of prosecutorial misconduct that Mr. Hines would
21 personally decide whether or not to have the office conduct an
22 investigation and at the end of the investigation he would
23 personally decide whether or not to impose any discipline.

24 So meanwhile in our complaint we attached a list of
25 more than 50 cases, 10 of which we've decided not to use, and

1 we've informed Mr. Larkin of that but there are 40 cases plus
2 another handful of cases that we also uncovered that we
3 provided notice to the City of. So total of about 45 or 50
4 cases where courts found misconduct by Assistant District
5 Attorneys in which we believe there was no discipline imposed.
6 Since Mr. Hines was the one who personally made the decision
7 in every case whether or not to investigate or to impose
8 discipline then we believe we're entitled to question him
9 about what he did in each case and why. And it's not
10 sufficient to put up some other subordinate who does not have
11 that authority when we already know what the system was and
12 that the buck stopped with Mr. Hines in every case and where
13 we know that he was so deeply involved in the Jabbar Collins
14 case and in other cases where there were Brady violations.
15 So --

16 THE COURT: Let me just tell you what I'm thinking at
17 this point and if we need to brief it we will. But I'm going
18 back to Judge Block's decision because it is the law of the
19 case and he starts with looking at Monell and obviously we all
20 agree and understand that a municipality is -- can only be
21 held liable if there's a municipal policy or custom that
22 caused the constitutional injury. In Connick v. Thompson, the
23 case where the court did not find, the Supreme Court did not
24 find there was a municipal policy, the court did say that
25 where a policy making individual exhibits deliberate

1 indifference to constitutional deprivations caused by
2 subordinates such that the official's inaction causes a
3 deliberate choice that acquiescence may be properly thought of
4 as a city policy or custom that's actionable under Section
5 1983, and they cite the Amnesty America case. Then this court
6 said the operative inquiry is whether the policy maker's
7 inaction was a result of conscious choice and not mere
8 negligence.

9 So Judge Block in making his ruling on the summary
10 judgment motion said that there were two possible ways in
11 which the City could be liable under Monell, and the first one
12 is the one that's relevant here although District Attorney
13 Hines is immune himself personally from liability as the
14 theory -- the plaintiff's theory is that as District Attorney
15 he ratified Vecchione's elicit tactic and that's on Page 23 of
16 Judge Block's decision.

17 MR. LARKIN: Page 23, I'm sorry. I'm just pulling
18 it up, Your Honor. I'm just trying to follow.

19 THE COURT: And the court ruled that after the fact
20 evidence is relevant as well as evidence -- well, after the
21 fact evidence is relevant and he cites a Fifth Circuit
22 decision Granstaff that the failure to reprimand, fire, admit
23 error, et cetera after gross violations sheds light on or
24 reflects a tacit policy on the part of the policy maker to
25 condone whatever his subordinates deemed necessary to secure

1 conviction.

2 The City obviously says -- disputes that. What
3 Judge Block said was yes, we've got on one hand the plaintiff
4 saying that DA Hines was actively involved, deliberately
5 indifferent rather than negligent in what he was doing and the
6 City says no, absolutely not. It's just a [inaudible] set
7 forth for a subordinate accused of wrongdoing among other
8 things. What Judge Block said was the jury is going to have
9 to decide this unless another motion is filed and there's a
10 clear answer [inaudible]. What he specifically said was that
11 the plaintiff is entitled to develop this theory after the
12 fact evidence. And on emphasis on both, entitled to develop a
13 theory and after the fact evidence.

14 So as I read that decision and as I read the Supreme
15 Court cases I think it would be very difficult not to allow
16 the plaintiff to depose the District Attorney in this case.
17 There's just too much -- there are too many facts that have
18 been alleged in this case that Judge Block believes are
19 critical to both sides developing the case not to permit him
20 to be deposed.

21 Now, I assume, Mr. Rudin, that you would depose him
22 after you depose the others, the people who are subordinates.
23 Is that right?

24 MR. RUDIN: Basically, yes.

25 THE COURT: So after you have deposed these others if

1 you still want to depose him, which I assume you will, I'll
2 give Mr. Larkin an opportunity to say why it's not necessary
3 but I think it's going to be very difficult -- that's going to
4 be a hard position for the City to take in view of the facts
5 of this case and of Judge Block's decision in the summary
6 judgment motion.

7 MR. LARKIN: I'm not intending -- I don't know that
8 I will be deposing his -- other members of his executive staff
9 who would the City might prefer that I depose because my
10 experience in other cases like this is it's just a waste
11 because everyone defers to the District Attorney.

12 THE COURT: Well, I'm not telling you you have to.
13 What I'm -- and I'm not making a ruling here, Mr. Larkin. I 'm
14 just giving you my reason at this point of where I'm intending
15 to go in case that might help you.

16 MR. LARKIN: I understand. The only thing I suggest
17 is that -- I realize there are facts alleged in the complaint,
18 questions whether the allegations have any real grounding,
19 whether they have any basis in fact. For example, I believe
20 counsel just stated that Mr. Hines assigned Monique Ferrell to
21 handle the -- to handle the habeas petition and that his
22 office opposed the motion to disqualify the DA and the entire
23 Kings County judiciary. The DA opposing a motion like that is
24 no surprise and I can't imagine that DA Hines had to be
25 consulted for any length of time in connection with opposing a

1 motion like that. So the suggestion that somehow that motion
2 which was made by Mr. Collins warrants a deposition of the
3 District Attorney in this case, an elected official, it just
4 doesn't hold any water. There's nothing to it.

5 THE COURT: I hear what you're saying but Judge Block
6 did say that the failure to reprimand, fire or admit error
7 after gross violations sheds light on a policy and based on
8 the facts that were before him in the summary judgment motion
9 he felt that this claim, the Monell claim should go forward
10 and specifically that the District Attorney's involvement was
11 critical there. So that's what I'm saying. I think we should
12 not get lost in the trees and we should look at the forest
13 here.

14 I'm not going to make a final decision until after
15 Mr. Rudin says he's taken all the depositions he needs to take
16 but I'm just telling you at this point based on what I've seen
17 and Judge Block's decision I do believe that it's going to be
18 necessary to depose -- to permit the plaintiff to depose the
19 District Attorney.

20 MR. LARKIN: I understand, Your Honor. We of
21 course -- I'll report back to my client about all this and we
22 can -- we will have an opportunity though as I understand it
23 to put papers in to make an appropriate argument when we get
24 there.

25 MR. RUDIN: Of course. But it will be expedited. I

1 don't want this to delay the case too much.

2 MR. LARKIN: I understand. That's why I raise this
3 now because --

4 THE COURT: Sure.

5 MR. LARKIN: -- I'm hoping that we can resolve this
6 not too far in the future so that it doesn't end up delaying
7 the case.

8 THE COURT: Right. That's why I'm raising it now too
9 so that both sides understand where I'm headed and I believe
10 that it's very consistent with Judge Block's ruling.

11 Now getting into the privilege log and the privilege
12 issues. There are -- obviously I haven't had a chance to go
13 through all these documents yet.

14 MR. LARKIN: Yes, Your Honor, there are a great many
15 of them.

16 THE COURT: So let me tell you how I handle privilege
17 issues and specifically why I asked you to submit everything.
18 First, I wanted to just see the scope of the review and the
19 kinds of evidence or documents that would be produced. But
20 the other thing I want to do is I need to know a few things
21 before I can resolve this privilege issue. The first is, and
22 I know that this is -- you didn't have a lot of time to
23 prepare this but the documents that were presented aren't
24 numbered in any particular way to correspond to the privilege
25 log. Now I assume that by going through them which -- I've

1 looked at some them -- I could figure out what's what but
2 that's -- I want to be sure that I'm looking at the document
3 that corresponds to the privilege log.

4 MR. LARKIN: Your Honor, each of the documents has
5 got, I believe should have a Bates number on it and our
6 privilege log -- for example, I don't have it in front of me
7 but Document Number 1 there's a description of documents and
8 then there's a series of Bates numbers and an assertion of
9 privilege and that the Bates numbers -- the documents are in
10 Bates number order. So if the document -- if Item 1 on the
11 privilege log happens to be Bates Number 3400 if you would
12 look throughout the documents we submitted and you come to
13 number 3400 that's the document that we're -- that's
14 identified in that entry of the privilege log.

15 Now, if it's easier for the court, if you want me to
16 have a paralegal go through the log again and make sure -- and
17 create a --

18 THE COURT: No, not yet.

19 MR. LARKIN: -- documents that's in order --

20 THE COURT: No.

21 MR. LARKIN: In order of the log, would that be
22 easier?

23 THE COURT: Well, I'm assuming right now that it is
24 in order with the privilege log. Is that correct or are these
25 documents not in the order of the privilege log?

1 MR. LARKIN: No, they're not in order of the log.
2 They're in Bates number order so they start with the lowest
3 Bates number.

4 THE COURT: Let me just ask you a question before you
5 say that. I'm holding them in my hand now and I have your
6 privilege log in front of me.

7 MR. LARKIN: Okay.

8 THE COURT: Number 1, undated handwritten notes by
9 Kings County DA, Assistant DA and then in front it says Doc ID
10 Numbers 3, 157 and 693, et cetera, et cetera. So the first
11 one actually is Number 3. That's the one --

12 MR. LARKIN: Right. That's because that happens to
13 be the lowest Bates number and that's the first -- that's the
14 first document. So the Doc ID number is really the Bates
15 numbers. The same thing. Sorry that wasn't clear, Your
16 Honor. So all those Doc ID numbers are the same numbers that
17 are on the log are on the documents, identify the documents.
18 So let me just pull up the log here.

19 THE COURT: So Number 1 and Number 2 are the lowest
20 and Number 1 and Number 2 correspond to the first two
21 documents you gave me but the third document is actually
22 Number 4 on the privilege log. Then it's going to be a
23 little bit confusing to figure out what's what I think.

24 MR. LARKIN: Would it be easier -- I will absolutely
25 be happy to have our paralegals put together a set in the

1 order of -- in the order in which they appear in the privilege
2 log if that would be easier.

3 THE COURT: Let's go through some of the other issues
4 and then we'll figure out where to go on this.

5 The next thing is that -- and I know you didn't have
6 a lot of time for this but my request was that the documents
7 be produced with highlighting the parts of the documents that
8 you believe are privileged. I'm assuming that you don't think
9 that all of -- each one of these documents is privileged and
10 because you know the documents better than I do it's -- I'm
11 not going to be the one who's going to figure out what you
12 think is privileged in these documents. Am I missing
13 something here?

14 MR. LARKIN: I think that --

15 THE COURT: I mean --

16 MR. LARKIN: If there's actually handwritten notes on
17 habeas motion I thought that the log would be clear enough to
18 indicate what was privileged. If that's not the case, Your
19 Honor, then we will go through these again and highlight what
20 needs to be highlighted. I think -- if it says undated
21 handwritten notes and there's a full page of notes the
22 privilege would apply to the entire document. I think if the
23 log entry said handwritten notes on copy of transcript or
24 whatever then the handwritten portions would be what's
25 privileged.

1 THE COURT: Okay. So, in other words, when I get the
2 complaint for Collins v. Miller in the habeas petition I guess
3 before Judge Garaufis it's only the handwritten --

4 MR. LARKIN: It will only be the handwritten -- sure.
5 It will only be the handwritten portions. A public document
6 clearly there's no privilege if that attaches --

7 THE COURT: Yes.

8 MR. LARKIN: But there are the handwritten notes that
9 reflect the mental impressions of the Assistant DA working on
10 the case that would be this assertion of privilege.

11 THE COURT: Okay. Then there are also some
12 duplicates in there too. I mean --

13 MR. LARKIN: There may be duplicates, Your Honor.
14 I'm sorry if there are. There might be some non identical
15 copies with different handwriting on them [inaudible] assert
16 privilege but it says duplicate. I will administer 40 lashes
17 to my paralegal.

18 THE COURT: I don't want to be complicit in that.

19 MR. LARKIN: That's right.

20 THE COURT: So are you saying that each one of the
21 documents that you are submitting contains an attorney's
22 mental impression rather than factual matters?

23 MR. LARKIN: I believe that most if not all of them
24 do and some of them also may be pre-decisional. I don't know
25 if the log reflects that but I'm -- in general if there are

1 drafts of materials that were eventually submitted I think --
2 we would qualify them to be on the same privilege, the work
3 product privilege as well as the pre-decisional privilege.
4 It's mainly work product because we're talking about lawyers.

5 THE COURT: Have you identified them on a privilege
6 log, each person who is the author of the document?

7 MR. LARKIN: To the extent we could we did. To the
8 extent that there were notes in the DA's file that we could
9 definitely see were not created by a police officer. For
10 example, we would assert the privilege on behalf of an
11 Assistant District Attorney for an agent for the DA's office.

12 THE COURT: Do you which files -- do you know if they
13 were taken from individual's files? Can you be certain where
14 you don't identify who the person is that it was an ADA for
15 example who made the statements?

16 MR. LARKIN: I can't say which files they came from.
17 I can -- because the files were kept -- at this point it's an
18 old case and all the files, everything that they had, that any
19 individual had was with the main case file. That much I did
20 nail down with the client. To the extent there were any notes
21 -- in good faith, Your Honor, I can assert that they were
22 created by an Assistant DA because we did isolate the
23 detective's notes from the folder, from the case file and
24 produce those. So I can't identify by name every -- the
25 author of every document. I can assert in good faith that I

1 believe them to all be Assistant DA's. If the court wants
2 more information I would go back to my client and I would -- I
3 guess I'd have to go through item by item anything that we
4 couldn't identify [inaudible] and ask them to tell me -- do
5 you recognize this handwriting or who wrote it but I believe
6 it all [inaudible] the DA's. I draw that inference after
7 speaking to my clients and after going through the documents
8 myself.

9 THE COURT: One of the questions I had if you in good
10 faith can say that these are ADA's who made those notes or
11 whatever wrote those memos, the next question I have is
12 assuming they are attorney's mental impressions how would I be
13 able to ascertain or even plaintiff be able to ascertain
14 whether the information contained in them is available from
15 another source if you don't even know what that source was?

16 MR. LARKIN: I'm not sure I'm following. I'm sorry.

17 THE COURT: Well, for the attorney's mental
18 impressions, what kind of privilege -- obviously it comes in
19 two brands and the most protected is the attorney's mental
20 impressions but it's not an absolute protection because if the
21 information is essential or necessary to the plaintiff's case
22 and it's unavailable from other sources then the court can
23 order that it be disclosed. It's not -- the privilege is not
24 absolute. So if I -- let's say I find a document that I think
25 is highly relevant to the plaintiff, the plaintiff needs to

1 know about even though it is an attorney's mental impression,
2 how am I going to know whether it's available from another
3 source if I don't even know what that source was? For
4 example, if I knew who the author of the note was possibly
5 deposing that person you'd be able to elicit the information.

6 MR. LARKIN: Right.

7 THE COURT: Without knowing who that ADA was or
8 whether that ADA -- what year the ADA left the office, how am
9 I going to be able to make that evaluation? Don't I have to
10 in effect make an assumption that it's not available from
11 another source because we can't even identify this source?

12 MR. LARKIN: That's actually a good point. Could I
13 ask for an opportunity, Your Honor, to make -- with respect to
14 any such document that comes up could I make a further
15 submission in camera perhaps to explain whether we -- well, to
16 either assess whether we can continue to assert the privilege
17 or -- and if so what the basis of it would be? In other
18 words, maybe if there is such a document, a handful of such
19 documents among those that Your Honor reviews if we could then
20 isolate those documents and I would certainly go back to my
21 client if I had to and ask for more information if it's
22 needed. If it's clear that there are certain documents that
23 contain mental impressions and it's clear that they ought to
24 be protected then we might not have to undertake that analysis
25 for those documents. I'm not sure if I'm -- I hope I'm being

1 responsive.

2 THE COURT: Well, it sounds though we have to do two
3 camera reviews then and then you would have an opportunity to
4 try to find more information. I think that what really needs
5 to be done is that you need to look at these documents very
6 closely and let me know the ones that you think are really
7 critical to you and really --

8 MR. LARKIN: Okay.

9 THE COURT: Because if I don't know who it was I
10 don't see how I can say that there's no substantial --

11 MR. LARKIN: I understand. I understand. Your
12 Honor, if we could have until -- today is March 21st. I'm out
13 as I said all of next week. Can we have until Wednesday,
14 April 3rd, to further submit to the court the documents that we
15 truly believe are critical to making this privilege and then
16 the other documents that we decide are not privileged
17 [inaudible] produce to Mr. Rudin.

18 MR. RUDIN: Your Honor, may I just be heard just for
19 a moment?

20 THE COURT: Yes. I'm not done with my analysis yet
21 but go ahead.

22 MR. RUDIN: I just wanted to point out that in the
23 City's response to our papers they did not assert that this
24 opinion work product. They asserted it was fact work product.
25 That's the first thing.

1 The second thing is that we raised this objection
2 early on to the absence of identification either of the dates
3 of a lot of the materials as well as the name of the author
4 and the City's response was we don't want to go -- we don't
5 want to have to do that, that's too troublesome. I just don't
6 -- our overriding concern is just to get this done as quickly
7 as possible so we have the documents for the depositions and
8 the reason we have to schedule four depositions even though we
9 don't have these documents is just about getting everything
10 done by the deadline if -- that's our concern. I just wanted
11 to put that out there and then Your Honor can --

12 THE COURT: I hear you on that. It's true. The
13 defendants don't actually argue that all these documents
14 constitute the core attorney work product. What I really want
15 to do is I want to cull these down to what's absolutely
16 essential. So --

17 MR. RUDIN: I believe, Your Honor, that a substantial
18 number of them do constitute core work product. To the extent
19 some of them I guess we call it fact work product. We've
20 got -- you've got both sides making assertions about fact work
21 product. We've made an assertion and I think it's a very
22 important thing concerning an affidavit that the plaintiff has
23 for a key witness in this case. In fact, the key witness, the
24 most important witness in the case has met with plaintiff's
25 counsel and has signed an affidavit. It's purely fact work

1 product and we attempted to get it and Your Honor's view is
2 that it was fact work product and it couldn't -- we could
3 depose the witness and that would be sufficient for us. If
4 it's sufficient for us it should be sufficient from both sides
5 with respect to fact type work product.

6 THE COURT: But there you could have deposed the
7 witness. One of the big -- the big distinction here that I'm
8 seeing is that it's hard to know which witness to depose.

9 MR. RUDIN: That can easily be determined with
10 respect to a specific document if there are -- if there's
11 information there that Your Honor believes is critical to the
12 case and that might not or could not or possibly might not be
13 available from another source.

14 THE COURT: And also I looked at some of the
15 documents -- when I look at the documents I can make the
16 determination of whether there's substantial need and if
17 there's substantial need then we look to see whether they're
18 available from another source.

19 So what I'm asking you to do, and I'm cognizant of
20 both sides' concerns here, we need to do this quickly. It
21 needs to be done fairly so the rulings are consistent with
22 both sides but I think that the defendants are right in
23 suggesting that it would make sense for them to go back
24 through this privilege log and the proposed privileged
25 documents and cull out the ones that you think don't really

1 meet the standard and let me look at those. Then if you could
2 order them in the order of the privilege log and give me as
3 much specificity if possible and then on those documents if
4 there are sections that are privileged and other sections that
5 aren't, just highlight the parts that are privileged.

6 MR. LARKIN: Okay. I think, Your Honor, in good
7 faith that we did designate documents that met the test. I'm
8 not --

9 THE COURT: Okay.

10 MR. LARKIN: -- [inaudible - speaking over] that did
11 not meet the test but in order to ease the burden and to move
12 the case along I can understand that notes that recite -- that
13 reflect back that are known and that are well known -- I mean
14 I don't know that it's worth asserting and litigating a
15 privilege over documents like that in these circumstances. So
16 I'm certainly willing to go back through the documents and to
17 make a further submission along the lines or exactly as Your
18 Honor suggested.

19 One question though I do have. I'm thinking about
20 this and given the amount of material. I think a realistic
21 date would be Friday the 5th of April for that further
22 submission. Could that -- is that acceptable to the court?
23 And it's only -- I would do it a week from tomorrow but I'm
24 going to be out next week because my kids are off -- my
25 daughter is off from school and we're going away.

1 THE COURT: If you need the extra two days that's
2 fine.

3 MR. LARKIN: Thank you very much.

4 THE COURT: I'll try to turn it around quickly.

5 MR. LARKIN: Thank you, Your Honor.

6 THE COURT: The last thing I want to do is I would
7 like to have the defendants separate these documents into
8 groupings. In other words, there are similar kinds of
9 documents that I could make template rulings on.

10 MR. LARKIN: Yes.

11 THE COURT: If you could just highlight which ones
12 you think are in which groups and either I'll agree with you
13 or not agree with you but it's likely I'll agree because I
14 think it's fairly clear. I can then make those rulings and
15 then you all can either meet and confer afterwards or I'll
16 just issue a ruling.

17 MR. LARKIN: That makes sense, Your Honor. We can do
18 that, yes.

19 THE COURT: Okay.

20 MR. RUDIN: Your Honor, may I make just one other
21 point?

22 THE COURT: Sure.

23 MR. RUDIN: It seems to me that -- given the nature
24 of the issues in this case where what's of concern is not only
25 what facts were known to the District Attorney's Office but

1 also why they did certain things. It seems to me that the
2 distinction between opinion and fact work product may not be
3 always a valid distinction. An opinion may be exactly what
4 the case about. So I just wanted to make that point but maybe
5 it's already obvious.

6 THE COURT: Well, it may well be that there's not
7 going to be a big dispute about some of the documents that
8 we're talking about and that the numbers that are really in
9 dispute will be a fairly small number is my guess because some
10 of the things written on a brief for example are really of
11 little consequence to either side is my guess.

12 MR. RUDIN: We're not interested of course in why
13 certain jurors were selected or not selected or notes about
14 the trial testimony. Things like that are -- obviously we're
15 not interested in.

16 THE COURT: Right. I think Mr. Larkin can put those
17 in groups and to the extent he doesn't want to disclose those
18 but they fall into a category you don't care about that could
19 be disclosed fairly easily.

20 MR. RUDIN: Yes.

21 MR. LARKIN: I agree.

22 THE COURT: Anything else?

23 MR. RUDIN: Not on that issue.

24 THE COURT: So let me just go to my calendar here.

25 MR. RUDIN: We were wondering if you could work back

1 from the August 17th date to figure out a schedule to deal with
2 open discovery issues.

3 THE COURT: Sure. Go ahead. Do you want to propose
4 one?

5 MR. RUDIN: So the -- initially the defendants
6 refused most of what we requested. Then we had a -- what
7 seemed like a very productive series of telephone discussions
8 the last few days where for the --

9 MR. LARKIN: I just have to interject. We didn't
10 refuse most of what was requested. Every time counsel makes a
11 representation like that I'm trying hard to bite my tongue.

12 THE COURT: Mr. Larkin, --I actually have a filter on
13 my ears. So I really don't listen to any of those comments.
14 All I listen to is what's your dispute now, not what happened
15 in the past.

16 MR. LARKIN: All right.

17 MR. RUDIN: Your Honor, we discussed a great number
18 of requests where it did not appear that defendants were
19 inclined to comply and as a result of that conversation
20 defense counsel indicated that it would consult with its
21 client, with their client and we don't know yet what the
22 result of that will be. Until we know the result of that we
23 don't know whether we're going to have two or three basic
24 issues to address or 10 or 12 significant issues to address.
25 So I was hoping to build into the schedule enough time for us

1 to prepare our papers. So I would propose where I thought Ms.
2 Krasnow was going to be in a position go give the answer of
3 the client next week, that may not be accurate. In light of
4 what Mr. Larkin said before we had this conference -- I may
5 not be -- I may have misunderstood but I thought that they
6 would be in a position to get back to us next week so that we
7 could have our motion to compel done by let's say April 2nd and
8 go from there.

9 So I thought maybe we could be -- ours could be
10 April 2nd and theirs April 9th. We'd have a few days to reply
11 and then the court would have five days or so to deal with the
12 papers if that's enough. Obviously Your Honor will set the
13 schedule. I just was hoping to have enough time so we can
14 frame the issues and brief them. These are very significant
15 issues to the resolution of the case so that the court will
16 also have enough time to review the papers.

17 MR. LARKIN: Your Honor, if I can just briefly make a
18 suggestion.

19 THE COURT: Sure.

20 MR. LARKIN: What I suggested was that instead of
21 having motions due on April 2nd since I'm away all next week I
22 was going to suggest motions due on the 8th, opposition on the
23 12th, and that would give the court a couple of days, four or
24 five days and I realize it includes a weekend and forgive me
25 for implying that five -- the five days includes those days.

1 I don't mean to suggest that, to suggest more work for the
2 court but if we get motions in on the 8th for anything that's
3 outstanding, opposition on the 12th which is that Friday and
4 then to the extent the court needs to hear further argument
5 obviously either side would have an opportunity on the 17th,
6 the day of the conference to make whatever additional points
7 were necessary. It builds in just a little more time to let
8 us confer with our client in detail about some of these
9 issues. The plaintiff has asked for personnel records of
10 retired Assistant DA's. I don't know what the burden is on
11 finding that stuff. I'm not sure how much of it is there and
12 I'm not sure if the client -- the client may have strong views
13 about what ought to be produced and how if it's going to be
14 produced, how it should be protected.

15 So the -- I do -- I just think, Your Honor, that
16 giving us until April 8th to file what needs to be filed is
17 well within the schedule and I hope it would give the court
18 enough time. If not then obviously whatever time the court
19 needs we're more than amenable to follow and it goes without
20 saying. It's up to the court as to what and how much time
21 Your Honor needs to resolve these matters.

22 THE COURT: I can't tell you how much time I need
23 because I haven't seen the in camera submission privilege log
24 and I don't know how many documents you're going to have. I
25 do know what my schedule is and I do have a number of other

1 cases. I'm trying to give this case a priority.

2 If I adopt that schedule and I can't resolve
3 everything on the 17th which is possible then we'll just pick
4 another date very shortly afterwards.

5 MR. RUDIN: Your Honor, the two problems with what
6 Mr. Larkin proposed. The first thing is that I had assumed
7 that we would go first on the motion to compel after we
8 received their response and I don't know with this schedule
9 Mr. Larkin will be communicating to us their position and if
10 Mr. Larkin is going to go first by making a motion for
11 protective order then for us to only have four days to respond
12 to what may be a very great number of issues, all which have
13 great importance for the case is just not adequate.

14 So that's why I think the first thing is when will
15 they communicate their position to us. Can we have a deadline
16 for that? And then assuming that there's a deadline who goes
17 first. Should this be a motion to compel or a motion for
18 protective order.

19 MR. LARKIN: Your Honor, I'm sorry. This is Arthur
20 Larkin speaking. I had assumed that this would be a motion to
21 compel by the plaintiff for any documents that the City
22 objected to and took the position was not discoverable or was
23 privileged or whatever and that we would put our opposition in
24 after we received the motion to compel. I wasn't going to
25 move for a protective order.

1 MR. RUDIN: All right.

2 MR. LARKIN: I don't want to create more work. I
3 think one set of papers is sufficient and I would say that
4 certainly during that week of April 1st we will have an
5 opportunity to have an in-depth discussion with plaintiff's
6 counsel about our position about what's out there, about what
7 issues remain so that by the 8th that following Monday a motion
8 for the -- it seems to me that that would be enough time to
9 have a motion filed on these discovery matters and we oppose
10 in a week and then appear and argue what we need to argue but
11 I --

12 MR. RUDIN: Your Honor, April 8th is a Monday. April
13 5th is a Friday. So under that proposal we may not know their
14 position until April 5th. These are very significant issues
15 and we have disagreements about -- potential disagreements
16 about very fundamental issues.

17 THE COURT: Mr. Rudin, if you don't know their
18 position until the 5th when do you want to file your motion to
19 compel?

20 MR. RUDIN: I'd like a week from when we know their
21 position but I --

22 THE COURT: April 12th? You get a choice. You can
23 either have time to file the motion to compel or you can have
24 an expedited briefing schedule. It sounds to me as though it
25 probably makes more sense to have a little more time to file

1 the motion to compel and I'll try to find you some time to
2 address that.

3 MR. RUDIN: I was trying to work within -- work
4 towards a date of April 17th but if Your Honor would then
5 schedule a different date then that's fine. I'm just trying
6 to --

7 THE COURT: I have the 17th for the privilege issues
8 already. Just give me a proposed schedule and I'll see what
9 Mr. Larkin says and I'll just order it one way or the other.

10 MR. RUDIN: Then I guess April -- if Mr. Larkin needs
11 all of the week of April 1st then one week from the 5th for our
12 papers. So our papers would be due the 12th.

13 THE COURT: Okay. Mr. Larkin, your --

14 MR. LARKIN: Opposition within a week, the 19th.

15 MR. RUDIN: We would like three days to reply.

16 THE COURT: You usually don't get replies on
17 discovery motions. Do we need it in this?

18 MR. RUDIN: Well --

19 THE COURT: Would it be helpful? In other words,
20 will it make it easier for me at the argument to hear your
21 reply?

22 MR. RUDIN: I do think it would -- I honestly think
23 they're going to -- given the discussions we've had up to now
24 that we're likely to have some very significant disagreements
25 and we would like the opportunity to reply in writing.

1 THE COURT: You may have that. So when do you want
2 the reply?

3 MR. RUDIN: The 19th is a Friday. Maybe Tuesday the
4 23rd.

5 THE COURT: Okay. So let me find some time.

6 MR. RUDIN: Your Honor, I'm sorry. We have an
7 evidentiary hearing on the 22nd. That's probably going to take
8 the whole day and -- Wednesday the 24th. Could we have
9 until -- we could -- we have the weekend and then we'd have
10 the 23rd. If we could have the end of the 23rd.

11 THE COURT: Are you sure?

12 MR. RUDIN: Well, no. I'm just trying to move the
13 case along.

14 THE COURT: Let me tell you what I'm going to do --
15 if you could it -- how about the 24th?

16 MR. RUDIN: Okay. Thank you.

17 THE COURT: I'm sure I'm going to need at least -- so
18 May 1st --

19 | [Pause in proceedings.]

20 THE COURT: Actually I can give you the most time on
21 May 3rd. So that means you want to -- May 3rd, does that work?

22 MR. RUDIN: Yes.

23 MR. LARKIN: I believe -- let me just see. Yes, it
24 does, Your Honor.

25 THE COURT: 2:30?

1 MR. LARKIN: 2:30, yes, Your Honor.

2 MR. RUDIN: That's fine.

3 THE COURT: Do you want to come in or do it by phone
4 again?

5 MR. RUDIN: This may [inaudible] as a discussion
6 [inaudible] today perhaps we should come in.

7 THE COURT: Doesn't matter. It's working fine by
8 phone. It's really up to you. If I need to look at something
9 then we could do it in person but otherwise I'm happy to do it
10 by phone unless you feel uncomfortable with that.

11 MR. LARKIN: I just assume come in just in case that
12 is the case.

13 MR. RUDIN: We can come in. That's fine. Whatever
14 the court -- whatever makes sense.

15 THE COURT: See you -- well, we'll be talking on the
16 17th but the next conference is the 2:30.

17 MR. RUDIN: Your Honor, the other thing is as far as
18 the documents that the City defendants are willing to produce,
19 if we could have some sort of working understanding of when
20 they would be produced and perhaps if Your Honor can give them
21 some idea of [inaudible] likely produce whatever documents the
22 court orders on May 3rd. We're just trying to avoid
23 [inaudible] delay and they may raise privilege issues about
24 some of these documents. We're just trying to avoid having
25 everything delayed to the summer and then getting depositions

1 done.

2 THE COURT: Mr. Larkin, go ahead.

3 MR. LARKIN: I was just going to say I am -- to the
4 extent that we agree to produce documents I'm going to make it
5 clear to the DA's Office that we need to do it quickly. This
6 is not going to be your typical 30 day or 45 day turnaround.
7 It will have to be as quickly as possible and I've got --
8 hopefully I've got a couple of paralegals who can help us
9 gather materials. We might even be able over there and get
10 stuff.

11 So I think during our prior discussions plaintiff
12 had suggested three weeks for anything we agreed to --
13 everything we agreed to produce. I'll make every effort to
14 meet that. So --

15 THE COURT: So even if there's a document -- if
16 there's a dispute about the documents unless the dispute is
17 over burden the DA's Office should be providing you those
18 documents so that they're in your office and you can produce
19 them if the court orders.

20 MR. LARKIN: Yes, I agree.

21 THE COURT: So rather than having the DA's Office
22 saying well, [inaudible].

23 MR. LARKIN: Yes, Your Honor, I agree with that.

24 THE COURT: Mr. Rudin, does that work?

25 MR. RUDIN: Yes, Your Honor.

1 THE COURT: So I'll talk to you on the 17th.

2 MR. LARKIN: The 17th, was that in person or over the
3 phone, Your Honor?

4 THE COURT: It was over the phone because we're
5 dealing with the privileged documents. If you want to come in
6 person you can.

7 MR. LARKIN: Telephone is fine.

8 MR. RUDIN: Your Honor, I'm sorry. There's one more
9 issue. That is sealed documents. We've asked for a number of
10 -- quite a few documents that relate to cases that were
11 prosecuted by the Brooklyn DA's Office that may have resulted
12 in a dismissal and a sealing under New York State law and
13 we've discussed some procedure where we can be notified which
14 cases the District Attorney's Office will decline to provide
15 because of sealing. Otherwise we have no way of knowing many
16 of the cases where they rely on sealing to decline to provide
17 the documents.

18 Then the next question is whether or not the parties
19 are willing to submit this to Your Honor to issue an unsealing
20 order where the documents need -- otherwise should be produced
21 or whether we're going to have to go the state court which
22 could put us at the mercy of a state judge who may not have
23 the same concern about moving this case along that all of us
24 have.

25 MR. LARKIN: Your Honor, I think that what I said to

1 the plaintiff is if the documents are sealed under state law
2 and the DA can't give them to us without a court order. So if
3 the plaintiff would want -- what I've said is I'll ask them
4 what's the easiest way to make them okay with turning the
5 stuff over, is it a state court order, should we go to -- is
6 it okay if one judge does it, do they have to go -- I mean
7 normally what you do is if you want records unsealed you go to
8 the presiding judge in the state court with an order to show
9 cause and if a court agrees they should be unsealed the court
10 will unseal them. That's typically what's done. I just -- I
11 want to have a discussion with them and give them an
12 opportunity to weigh in on how to deal with the issue.

13 Because the law is clear. If the case, the criminal
14 case is dismissed, if the plaintiff can get a release from the
15 individual whose case it was then I think the DA is okay with
16 releasing the records but if he can't get a release then there
17 has to be another way to do it so that they're not giving
18 up -- disclosing things that they shouldn't be disclosing
19 under state law.

20 THE COURT: I think the proposal or the question is
21 whether or not the defendants will consent to having a
22 particular court rule on the motion and whether the defendants
23 will be objecting to the unsealing.

24 MR. LARKIN: That I will have to take up with them.
25 I just don't know. Some DA's don't care. Some DA's take a

1 position on it. I'd have to ask them. I absolutely will do
2 that and we'll have that discussion -- that may be a discrete
3 issue. I might be able to talk to the plaintiff about that
4 tomorrow but if not certainly that week of April 1st as soon as
5 I'm back.

6 MR. RUDIN: We also need to know which cases this is
7 a problem for.

8 MR. LARKIN: Absolutely.

9 THE COURT: So can you identify before you leave, can
10 you identify by tomorrow which case that's a problem for or is
11 that too soon?

12 MR. LARKIN: I don't know. I mean there's 50 or 60
13 cases. I don't think I can do that before --

14 THE COURT: So why don't you identify and get a
15 position by April 3rd?

16 MR. LARKIN: Can we make that April 5th?

17 THE COURT: Yes.

18 MR. LARKIN: Just give me a little time.

19 THE COURT: April 5th.

20 MR. LARKIN: Yes, Your Honor.

21 THE COURT: Okay. So we have --

22 MR. LARKIN: That's all the issues.

23 THE COURT: Good. We have a transcript of these
24 proceedings so that I'm not going to be running in a docket
25 entry for every single thing that was ruled on but you all

1 have notes. Correct? Is there anything that you have a
2 question about?

3 MR. LARKIN: No, Your Honor, not from the defendants.

4 THE COURT: Thank you. I will speak to you next on
5 April 17th.

6 MR. RUDIN: Thank you very much.

7 MR. LARKIN: Thank you for your time, Your Honor.

8 Thank you.

9 THE COURT: Bye.

10 (Proceedings concluded at 1:12 p.m.)

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.



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5 _____

6 Shari Riemer

7 Dated: April 21, 2013

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